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80-2146

NO. 80-2416

IN THE
SUPREME COURT of the UNITED STATES
October Term, 1980

THE STATE OF FLORIDA,

Petitioner,

vs.

MARK ROYER,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Florida

SUPPLEMENTAL APPENDIX TO BRIEF OF PETITIONER ON JURISDICTION

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COMES NOW, the Petitioner, THE STATE OF FLORIDA, by and through its undersigned counsel, pursuant to Rule 51 of the Rules of the Supreme Court and moves this Honorable Court for rehearing and as grounds therefore shows:

1. That on May 26, 1981, this Honorable Court entered its order denying the State of Florida's Petition for a Writ of Certiorari, to wit:

> "The Court today entered the following order in the above entitled case.
>
> The petition for a writ of certiorari is denied. The chief Justice, Justice Blackmun and Justice Powell would grant certiorari and reverse the judgment." [Emphasis added].

On June 22, 1981, this Court granted a timely motion for an extension of time in which to file the present petition for Rehearing.

2. That the undersigned hereby certifies that the State's application shall be restricted to those permitted in Rule 51.2 and that the Motion for rehearing is presented in good faith and not for delay.

3. The Petitioner, The State of Florida submits that, in view of the several dissents to this Court's initial denial of certiorari, this Court plainly may exercise jurisdiction and the Constitutional analysis by the Florida Courts is plainly erroneous.

4. The Petitioner, The State of Florida, is caught upon the horns of a dilemma. The Florida District Court's opinion may not be facially significant to this court as a case upon which to exercise jurisdiction because it is a per curiam opinion without discussion. See, State v. Rodriquez, 389 So.2d 4 (Fla. 3d DCA 1980); but, see, Appendix attached hereto. But it is the succession of these opinions relying upon

the analysis in United States v. Mendenhall, ___ U.S. ___, 100 S.Ct. 1870 (1980) and Reid v. Georgia, ___ U.S. ___, 100 S.Ct. 2752 (1980), as announced in Royer v. State, 389 So.2d 1007 (Fla. 3d DCA 1981), which is significant to this Court and the exercise of its jurisdiction. See, also, Florida v. Harrison, U.S. Sup.Ct. Case No. 80-1319, cert. den., June 22, 1981.

In the present case, the State is faced with a "catch 22." The State is injured by a succession of per curiam opinions which are clearly erroneous but facially apparently not significant to this Court's jurisdiction, but collectively very important and uniformly devastating to the State's prosecutions. The state courts are also acutely aware of when this Court declines jurisdiction in the present matters. See, Appendix, attached hereto. The State is thus faced with a situation

where the denial of certiorari upon the present plainly erroneous decision doesn't really mean anything, but then it means a great deal to the state courts. Thus the clearly erroneous analysis persists, feeding upon itself.

These cases are significant and important to the exercise of this court's jurisdiction, because they plainly represent an erroneous departure of a fundamental nature from the proper Constitutional analysis in Reid and Mendenhall. The State submits that this Court, should treat the State's application from the per curiam opinion of the Florida District Court with the same fundamental significance that the Court has other per curiam opinions for criminal defendants. Consider, history of the case in, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963). The Constitutional error herein

against the state, as reflected in the above statement by the dissenters, is as egregious and fundamental as that announced in Gideon.

5. In further support of this petition, the State would note that on June 16, 1981, the State timely filed its Petition for Certiorari in Florida v. Royer, U.S.Sup.Ct. Case No. 80-2146. Royer is on all fours with Mendenhall, but reaches a directly contrary result. Before Reid, but after Mendenhall, the panel opinion in Royer would have prevailed upon the en banc rehearing. Royer and the present district Court opinion under the guise of the Fourth Amendment, apply extraordinary analysis to all police conduct and consent transactions, which was rejected recently by this Court in Edwards v. Arizona, ___ U.S. ___, 29 Crim.L.Rep. 3037 (1981), to wit:

> "The issue in Schneckloth [1] [412 U.S. 218 (1973)] was under what conditions an individual could be found to have consented to a search and thereby waived his Fourth Amendment rights. The Court declined to impose the "intentional relinquishment or abandonment of a known right or privilege" standard and required only that the consent be voluntary under the totality of the circumstances."
>
> [Emphasis added]

In Royer and the Case at bar, the standard applied in the airport context is not the "totality-of-the-circumstances" standard as demonstrated by the Florida Court's view herein that any approach by a police officer under the Fourth Amendment is a stop.

6. The present case should be heard by the Court to explain and confirm articulable suspicion in the airport context within the meaning of Reid and as a companion case to Florida v. Royer, and for clarifying a sub-Terry transaction and consent under Mendenhall. The State would also urge the

Court to consider the matter herein as a necessary companion to the matter of Reid v. Georgia on its second application for review or upon approval by the Court of the Georgia Appellate Court opinion after remand, filed on April 9, 1981. See, State v. Reid, ___ Ga.App. ___, 29 Crim.L.Rep. 2133 (1981) [on remand from, 448 U.S. 151 (1980)]. In Reid the Georgia appellate Court has reaffirmed its alternative view reported at State v. Reid, 149 Ga.App. 685, 255 S.E.2d 71 (1979) that the transaction therein was indeed a consensual transaction. The present case, presenting what is articulable suspicion and consent in the airport context as contrast to Reid v. Georgia, is therefore also substantial and warrants the exercise of this Court's jurisdiction.

WHEREFORE, upon the foregoing and such other matters as this Court deems appropriate, the Petitioner, THE STATE OF FLORIDA, prays that this Honorable Court will reconsider and rehear the matter herein and upon reconsideration will grant the Petitioner's application for review.

RESPECTFULLY SUBMITTED, on this _____ day of July, 1981, at Tallahassee, Leon County, Florida.

JIM SMITH
Attorney General

CALVIN L. FOX
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APPENDIX

THE MIAMI NEWS

Monday Afternoon June 22, 1981

COURT TOSSES OUT DRUG COURIER PROFILE

Combined Miami News Services

WASHINGTON - The Supreme Court today refused to let drug agents in Florida stop, question or search air travelers whose behavior fits a "drug courier profile."

The justices, without comment, left intact a Florida appeals court ruling that the "profile" program, begun by the federal Drug Enforcement Administration in 1974, is unconstitutional.

There is, however, at least one other similar appeal from Florida authorities pending at the high court. Today's action does not preclude the possibility that the issue will be granted review at some later date.

The case acted on today stemmed from the July 25, 1978, arrest at Miami

International Airport of Burr Stuart on cocaine-possession charges.

Two Dade County police detectives asked to talk with Stuart after observing his appearance and behavior in the airport terminal. Eventually, they asked for permission to search him and, when he offered physical resistance after initially agreeing to the search, Stuart was arrested.

Cocaine was found stored in Stuart's boot.

Assistant Florida Attorney General Calvin Fox, who originally argued that the drug profile was legal as a basis for searching suspected drug peddlers, said today that the ruling "doesn't affect the operations out there (at Miami International Airport) at all" because, he said, by refusing to hear the Stuart case, the Supreme Court did not set a precedent that extends beyond that case.

Drug agency spokesman Con Dougherty said today that his agency will continue using the profile.

The detectives who stopped Stuart were operating under a program similar to one carried out at more than 20 metropolitan airports nationwide. Uner the aegis of the Drug Enforcement Administration, officers search out passengers displaying characteristics and behavorial traits which...have tended to distinguish drug couriers from other passengers."

A Florida appeals court struck down Stuart's drug conviction, ruling in essence that all such "profile" stops are unconstitutional because they are not based on "probable cause" to believe a crime is being committed.

After the Florida Supreme Court refused to review that ruling, state Attorney Jim Smith sought help from the nation's highest

court.

Two Supreme Court decisions last year left the legal status of the drug agency-inspired airport program in doubt.